ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
DIVISION II

CA 05-1038

LYNDA RUDD
APPELLANT

V.

A.L. TENNEY TRUSTEE, STATE FARM FIRE AND CASUALTY COMPANY, and DEATH AND PERMANENT DISABILITY TRUST FUND
APPELLEES

March 15, 2006

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION
E508014

AFFIRMED

TERRY CRABTREE, Judge

By decision entered September 20, 2004, an Administrative Law Judge (ALJ) found that appellant Lynda Rudd failed to prove by a preponderance of the evidence that she is totally and permanently disabled as a result of her compensable injury of 1991, but found that due to her injury she sustained a fifty percent wage loss. The ALJ further held that appellee State Farm Fire and Casualty Company (State Farm) was not entitled to an offset for the benefits received by appellant under a long-term disability insurance policy. Both Rudd and State Farm appealed to the Full Commission.

The Workers' Compensation Commission affirmed the decision of the ALJ with regard to appellant's contention that she is totally and permanently disabled, finding that she failed to meet her burden of proof. The Commission modified the decision of the ALJ on the issue of wage-loss benefits. It held that appellant was entitled to a five percent wage-loss benefit rather than the fifty percent wage loss benefit granted by the ALJ. Further, the Commission agreed with and affirmed the ALJ's decision that State Farm did not prove entitlement to an offset for benefits received by appellant under a long term disability insurance policy.

On appeal, appellant challenges the decision of the Workers' Compensation Commission to deny her claim for total and permanent disability benefits. She asserts that under the odd-lot doctrine in effect at the time of her injury, the evidence supports a finding that she is permanently and totally disabled. She also maintains that it was error for the Commission to reduce her wage loss disability from fifty percent to five percent. We disagree and affirm.

Appellant began working for appellee, A.L. Tenney Trustee, in 1980, and she was working for appellee as a claims supervisor when she was injured in November 1991. She sustained an admittedly compensable injury to her neck and back when she fell from a ladder into some shelving. As a result, she required surgery on May 15, 1995. Dr. Richard Jordan performed an anterior cervical diskectomy with fusion at C5-6 and C6-7. He released appellant to return to work full-time on September 26, 1995.

Because appellant continued to experience pain in the lumbar region of her back, she received epidural steroid injections. Ultimately she required another surgery, and on June 12, 1996, Dr. Jordan performed a right hemilaminectomy and diskectomy at L4-5. Dr. Jordan performed a third surgery on December 19, 1997, when appellant had a right anterior scalenotomy and a lumbar epidural steriod injection. Appellant returned to work after each of these surgeries.

Appellant had surgery on the cervical area of her spine again on March 6, 1998. At that time she had an anterior cervical diskectomy with fusion at C4-5 with anterior plating. Following her healing period she returned to work, although she continued to complain of pain. Her fifth and final surgery was performed on September 7, 2000. Dr. Jordan performed an anterior cervical diskectomy and fusion at C3-4 with anterior synthes plating. After this final surgery, appellant's healing period extended beyond the twelve months covered by company policy, so her employment with appellee was terminated.

Appellant began seeing Dr. Thomas Kiser at the University of Arkansas for Medical Sciences, Department of Physical Medicine & Rehabilitation (UAMS) on May 24, 2001. Dr. Kiser did a thorough evaluation of appellant's condition and reported a recommended plan for her rehabilitation. In addition to physical therapy and medications, Dr. Kiser indicated he would see appellant in two months to evaluate her progress and hopefully put a return-to work program in place. Dr. Kiser's next report, dated August 17, 2001, notes that he spoke with appellant about returning to work. It was his opinion that she would need to start back slowly with half days three times per week, working up to a five-day work week. In a subsequent report dated September 20, 2001, Dr. Kiser recommends that appellant continue aquatic therapy. He noted that appellant expressed interest in volunteer work at Children's Hospital, and he agreed that it would be a good idea. He further opined that "as far as working in the future, I think she has good upper and lower extremity strength. Functionally, she could do the activity." It was Dr. Kiser's opinion that "once she has successfully done some volunteer work, looking at paid employment would be the next step."

On May 15, 2003, appellant and her attorney met with Chelle Williams, a vocational case manager with Corvel. Subsequent to this meeting, Ms. Williams prepared a vocational assessment report that outlined appellant's personal, educational, medical, and work background. Ms. Williams' recommendation was that she would complete a transferable skills analysis to identify appropriate vocational goals for appellant, and she would begin a survey of the labor market to determine the availability of employment opportunities. In the transferable skills report dated June 16, 2003, Ms. Williams outlined appellant's work history and noted that appellant was a high school graduate with one year of college and one year of business school. She also listed the restrictions given by Dr. Kiser, more specifically, that appellant had a ten-pound lifting restriction that placed her work capability as sedentary. Ms. Williams also prepared a labor market survey report dated July 29, 2003, that listed nine

job leads. Under the summary section of this report, Ms. Williams noted that appellant expressed the belief that she would not be able to return to work.

In addition to being evaluated by Dr. Kiser, appellant was also evaluated by Dr. William Ackerman. She reported to Dr. Ackerman that she was the sole caretaker of her six-year-old granddaughter, and that she had a surveillance video on her when she was taking care of her grandchild. During the examination she complained of pain and sleep deprivation. Dr. Ackerman's opinion was that his findings would substantiate the presence of moderate but not severe pain, and he made several recommendations regarding changes in medication. His report indicates that appellant was concerned with increasing her functionality so she could be more involved with her granddaughter. Dr. Ackerman opined that appellant "will not be able to resume gainful employment."

At the hearing of this matter, appellant testified that she is in too much pain to work. She further testified that she has had sole custody of her hearing-impaired granddaughter since May 2000. The child attends a private school in Jacksonville, and appellant drives her to school, and she also takes her to Children's Hospital in Little Rock once a week for speech therapy. Appellant testified that when she was living in Vilonia she was driving sixty miles in the morning and sixty miles in the afternoon to take her granddaughter back and forth to school. She subsequently moved to Jacksonville, so her commute is now a short distance. Appellant testified that she is not doing water therapy as recommended by her doctors because she does not feel it is helping her. She said she classifies herself as a homemaker not working outside the home. She testified that she considers herself disabled and has not made any effort to return to work; however, she stated she filled out applications for the jobs sent to her by Chelle Williams.

Chelle Williams testified at the hearing that to her knowledge appellant did not follow up on any of the jobs. She said she followed up with several of the employers and they did

not have active applications for appellant. Ms. Williams testified that when people do not have a financial incentive, they usually do not return to work. She said that appellant told her that her financial needs were being met. Ms. Williams also indicated that appellant seemed intent on staying home to care for her granddaughter. According to Ms. Williams, the United States Department of Labor's Dictionary of Occupational Titles classifies homemaker as a medium-duty job. The job leads provided by Ms. Williams to appellant were classified as light to sedentary.

Appellees provided a video surveillance tape of appellant that was introduced as evidence and shown at the hearing. The tape showed appellant entering Wal-Mart and leaving Wal-Mart with a shopping cart. The cart contained several large, plastic storage containers and a large bag of dog food. The tape showed appellant loading the items into the trunk of her car. Another segment of the tape showed appellant in the parking lot in front of her granddaughter's school, walking her into school, going to the post office, and other activities indicative of a normal homemaker's life.

Taking into consideration appellant's age, mental capacity, training, and work experience, the Commission agreed with the ALJ that appellant was precluded from falling within the odd-lot category for permanent and total disability. The Commission noted appellant's vast clerical experience, and that she attended college, business school, and had completed a computer class. While the Commission considered the opinion of Dr. William Ackerman, it gave more weight to the opinion of Dr. Thomas Kiser, who opined that appellant should be able to return to employment. The Commission also gave weight to the fact that appellant is a full-time caretaker for her granddaughter. In further support of the position that appellant is at least capable of light to sedentary work, the Commission cited its reliance on the video surveillance tape and still pictures depicting appellant engaging in normal daily activities.

When a claim is denied because the claimant has failed to show an entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Clardy v. Medi-Homes LTC Serv. LLC*, 75 Ark. App. 156, 55 S.W.3d 791 (2001). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Patterson v. Arkansas Dep't of Health*, 70 Ark. App. 182, 15 S.W.3d 701 (2000). The court will not reverse the Commission's decision unless it is convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Searcy Indus. Laundry v. Ferren*, 82 Ark. App. 69, 110 S.W.3d 306 (2003). It is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *Id.* Furthermore, the Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. *Id.*

The odd-lot doctrine provides benefits for an employee who is injured to the extent that the only services he can perform are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist and he may be classified as totally disabled. *Patterson v. Arkansas Dep't of Health, supra.* Appellant asserts that she falls under this doctrine; however, we disagree. Appellant has the burden of making a *prima facie* showing that she falls in this category based upon the factors of permanent impairment, age, mental capacity, education, and training. Only after she makes this showing does the burden shift to the employer to show that some kind of suitable work is regularly and continuously available to her. *Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W.3d 769 (2000) (citing Patterson v. Arkansas Dep't. of Health, *supra*). The court may also consider the appellant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the appellant's loss of earning capacity. *Ellison, supra.*

Appellant has a twenty-six percent impairment rating. By all accounts she is a bright, relatively young person who attended college and business school. She possesses extensive clerical experience and was working as a supervisor earning over $53,000 per year at the time of her injury. The vocational consultant identified several jobs for which appellant was amply qualified; however, appellant did not pursue these opportunities. It was the opinion of the consultant that, because appellant's needs were being met, she might not have the incentive to return to work. In fact, the combined total of appellant's workers' compensation, long term disability and social security disability, along with her granddaughter's disability benefits is over $65,000 per year, a sum greater than what appellant earned while she was employed. These factors, along with the photographs and video supporting the fact that appellant is capable of performing light work, were appropriately considered and weighed by the Commission. Because the Commission's decision displays a substantial basis for the denial of relief, we affirm on this point.

Appellant argues it was error for the Commission to reduce her wage loss from fifty percent to five percent. Pursuant to Ark. Code Ann. § 11-9-522(b)(1)(Repl. 2002), the percentage of permanent physical impairment along with a person's age, education, work experience, and other factors reasonably expected to affect his or her future earning capacity are to be considered by the Commission in evaluating permanent partial disability benefits in excess of the permanent physical impairment. The Commission may also consider a person's motivation to return to work. *Ellison, supra.*

The Commission held that "claimant has failed by her own actions to prove that she is entitled to fifty percent wage loss benefits." After recounting appellant's education and work experience, the Commission reasoned that appellant's current financial situation combined with her full-time responsibility of caring for her granddaughter served to dissuade her from seeking employment. We cannot say that the Commission's decision is not

supported by substantial evidence, and we affirm on this point as well.

Affirmed.

BIRD and GLOVER, JJ., agree.